

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS EUGENE GRAY,

Petitioner,

v.

THE PEOPLE,

Respondent.

Case No. 1:22-cv-01284-HBK (HC)

FINDINGS AND RECOMMENDATIONS TO  
DISMISS PETITION FOR LACK OF  
JURISDICTION<sup>1</sup>

OBJECTIONS DUE IN 14 DAYS

(Doc. No. 1)

ORDER DIRECTING CLERK OF COURT TO  
ASSIGN CASE TO DISTRICT JUDGE

Petitioner Thomas Eugene Gray, a state prisoner proceeding *pro se*, petitions for a writ of habeas corpus under 28 U.S.C. § 2254. (Doc. No. 1). This matter is before the court for preliminary review. Under Rule 4 of the Rules Governing Section 2254 Cases, the court must examine the habeas corpus petition and order a response unless it “plainly appears” that the petitioner is not entitled to relief. Under Rule 4, courts have “an active role in summarily disposing of facially defective habeas petitions.” *Ross v. Williams*, 896 F.3d 958, 968 (9th Cir. 2018) (citation omitted). The court may dismiss claims at screening for “easily identifiable” procedural defects. *See id.* Finding the petition successive, the undersigned recommends that the petition be dismissed.

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<sup>1</sup> This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2022).

## I. BACKGROUND

Petitioner initiated this case on October 7, 2022 by filing the instant Petition challenging his 15-year sentence imposed by the Tulare County Superior Court in 2014 after his conviction for first degree burglary and assault with a deadly weapon. (Doc. No. 1 at 5, 43). Generally, Petitioner claims the trial court violated the terms of his “negotiated plea agreement by making unauthorized use of his guilty plea” in imposing a sentence enhancement. (*Id.* at 5). Specifically, the Petition raises two grounds for relief: (1) ineffective assistance of trial counsel for failing to “investigate and enforce” the terms of Petitioner’s plea bargain, and (2) violation of Petitioner’s Boykin/Tahl rights “by not providing the required protection of the specific performance of his prior negotiated plea agreement.” (*Id.* at 5-9).

The Court takes judicial notice of its files and notes Petitioner filed a previous habeas petition in this Court challenging the same sentence imposed by the Tulare County Superior Court. *See Gray v. Asuncion*, No. 1:21-cv-00595-DAD-JLT. The petition was dismissed as untimely and for failure to state a cognizable federal claim. (*Id.* at Doc. No. 18); *See McNabb v. Yates*, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding “dismissal of a first habeas petition for untimeliness presents a ‘permanent and incurable’ bar to federal review of the underlying claims,” and thus renders subsequent petitions “second or successive”); *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 228 (1995) (“The rules of finality, both statutory and judge made, . . . treat a dismissal for failure to state a claim . . . as a judgment on the merits.”). Nothing in the docket shows that Petitioner obtained an order from the Ninth Circuit Court of Appeals authorizing him to file a second or successive petition.

## II. APPLICABLE LAW AND ANALYSIS

23 A second or successive petition that raises the same grounds as a prior petition must be  
24 dismissed. 28 U.S.C. § 2244(b)(1). Dismissal also is required for a second or successive petition  
25 raising a new ground unless the petitioner can show that (1) the claim rests on a new constitutional  
26 right, made retroactive by the United States Supreme Court or (2) the factual basis of the claim was  
27 not previously discoverable through due diligence, and these new facts establish by clear and

1 convincing evidence that but for the constitutional error, no reasonable factfinder would have found  
2 the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B).

3 However, it is not the district court that decides whether a second or successive petition  
4 meets these requirements; the petitioner must obtain leave from the Ninth Circuit Court of Appeals  
5 to proceed. See § 2244 (b)(3)(A) (“Before a second or successive application permitted by this  
6 section is filed in the district court, the applicant shall move in the appropriate court of appeals for  
7 an order authorizing the district court to consider the application.”); *Burton v. Stewart*, 549 U.S.  
8 147, 152-53 (2007); *Chades v. Hill*, 976 F.3d 1055, 1056 (9th Cir. 2020). This court is mandated  
9 to dismiss a second or successive petition unless the Court of Appeals has given petitioner leave to  
10 file the petition because a district court lacks subject-matter jurisdiction over a second or successive  
11 petition. *Burton*, 549 U.S. at 152 (2007); *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001).

12 Because Petitioner has previously sought relief from this Court for the same conviction and  
13 sentence, the undersigned finds that the instant petition is an unauthorized successive petition  
14 prohibited by 28 U.S.C. § 2244(b). Petitioner makes no showing that he has obtained prior leave  
15 from the Ninth Circuit to file his successive petition. Therefore, this Court has no jurisdiction to  
16 consider petitioner’s renewed application for relief under 28 U.S.C. § 2254 and must dismiss the  
17 petition. See *Burton*, 549 U.S. at 157.

18 **III. CERTIFICATE OF APPEALABILITY**

19 State prisoners in a habeas corpus action under § 2254 do not have an automatic right to  
20 appeal a final order. See 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36  
21 (2003). To appeal, a prisoner must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(2);  
22 see also R. Governing Section 2254 Cases 11 (requires a district court to issue or deny a certificate  
23 of appealability when entering a final order adverse to a petitioner); Ninth Circuit Rule 22-1(a);  
24 *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). Where, as here, the court denies  
25 habeas relief on procedural grounds without reaching the merits of the underlying constitutional  
26 claims, the court should issue a certificate of appealability only “if jurists of reason would find it  
27 debatable whether the petition states a valid claim of the denial of a constitutional right and that  
28 jurists of reason would find it debatable whether the district court was correct in its procedural

1       ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “Where a plain procedural bar is present  
2       and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not  
3       conclude either that the district court erred in dismissing the petition or that the petitioner should  
4       be allowed to proceed further.” *Id.* Here, reasonable jurists would not find the undersigned’s  
5       conclusion debatable or conclude that petitioner should proceed further. The undersigned therefore  
6       recommends that a certificate of appealability not issue.

7      Accordingly, it is **ORDERED**:

The clerk of court is directed to assign this case to a district judge for the purposes of reviewing these findings and recommendations.

10 It is further **RECOMMENDED:**

11                   1. The petition (Doc. No. 1) be DISMISSED as successive.  
12                   2. No certificate of appealability be issued.  
13                   3. The Clerk of Court be directed to terminate any pending motions/deadlines and  
14 close this case.

## NOTICE TO PARTIES

16 These findings and recommendations will be submitted to the United States district judge  
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14)**  
18 **days** after being served with these findings and recommendations, a party may file written  
19 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s  
20 Findings and Recommendations.” Parties are advised that failure to file objections within the  
21 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,  
22 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

23 Dated: October 24, 2022

Helena M. Barch-Kuchta  
HELENA M. BARCH-KUCHTA  
UNITED STATES MAGISTRATE JUDGE